

IN THE  
SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

.....Term, 1968  
Number.....78-5981.....

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FRANCIS RICK FERRI,  
Petitioner

- vs -

DANIEL ACKERMAN, ESQUIRE,  
Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF PENNSYLVANIA FOR THE  
COMMONWEALTH OF PENNSYLVANIA

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By,  
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337 F. 2d 883 (5 Cir 64)

#### CONSTITUTIONAL CITATIONS

Article I, Section 10, (Contracts)

Article 3, Section 9, (Bill Of Attainer)

Sixth Amendment

Fourteenth Amendment

#### FEDERAL STATUTES

Criminal Justice Act, 18 U.S.C., § 3006A

Criminal Justice Act Plan for W.D. of Pa.

#### STATE STATUTES

Rule 205, Penna. Rules Of Civil Procedure

#### OTHER AUTHORITIES

American Bar Association's Code Of Professional Responsibility  
Canons Of Ethics, 6-6 and 7

#### EXHIBITS

Ferri v Ackerman, No. 98 March Term 1973, Pa. Supreme Court  
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United States v Ferri, 546 F. 2d 419 (1976)

Rule 205, Pa. Rules Of Civil Procedure

Canon Of Ethics, 6-6 and 7

Excerpts, C.J.A. Plan for W.D. of Penna.

#### JURISDICTIONAL STATEMENT

(a) This is an appeal from the Opinion & Order of the Pennsylvania Supreme Court, Appendix page 1 thru 11, by a divided Court affirming the lower court's order dismissing petitioner's tort claim against his former assigned counsel.

(b) The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1257 (3). Appeals from state courts for writ of certiorari.

(i) The proceeding below centered upon petitioner's tort claim, under state law, seeking redress for injuries inflicted upon him by his assigned counsel in a criminal prosecution.

(ii) The Order of the Pennsylvania Supreme Court was entered on November 27, 1978 and has not been published.

#### QUESTIONS PRESENTED FOR REVIEW

Whether a lawyer appointed under the Criminal Justice Act, 18 U.S.C., § 3006A (1964) to represent an indigent defendant in a criminal prosecution is immune from tort liability at the suit of his former client for the failure on the part of that attorney to raise the statute of limitations defense, which would have barred prosecution for ancillary counts of that indictment in which that defendant incurred substantive consecutive sentences?

#### STATEMENT OF THE CASE

This is an appeal from the Opinion & Order of the Supreme Court of Pennsylvania (A. 1 thru 11) by a divided court affirming the order of the lower courts, which had dismissed petitioner's complaint against his former appointed counsel holding a lawyer assigned to represent an indigent defendant in a criminal prosecution was absolutely immune from the suit of his former client regardless of the tort inflicted upon that

former client. (A. 8)

On December 13, 1974, Attorney Daniel Ackerman, respondent, was assigned, pursuant to the Criminal Justice Act (CJA), 18 U.S.C. § 3006A (1964), to represent Francis Rick Ferri, petitioner, in a federal criminal prosecution. After a 3 week jury trial petitioner was convicted and the trial court imposed a 30 year term of incarceration. On direct appeal respondent withdrew representation and petitioner obtained retained counsel, who for the first time raised the issue that the statute of limitation had expired for certain counts of that indictment; that the conviction and 10 year sentence on those counts must be vacated.

In the interim petitioner filed a pro se complaint (including amended complaints) charging the respondent with gross negligence, malpractice and breach of contract to the degree of malfeasance for acts of omission, in the Court Of Common Pleas, Westmoreland County, Penna. After cross briefs were filed petitioner modified his complaint to the specific issue of respondent's failure to protect the fundamental right of the petitioner not to suffer a prosecution and conviction with the subsequent term of incarceration where the statute of limitation had expired. In support of his complaint petitioner presented the Court of Common Pleas with exhibits (copies A. 12, 13 and 14) of the Third Circuit Court's Order affirming petitioner's conviction, 546 F. 2d 419, (1976), where the Court held that failure to raise the limitations defense at trial constituted a waiver.

The Westmoreland County Court held the respondent was absolutely immune for the tort noted above for reasons of public policy. The Superior Court of Penna. affirmed and the Supreme Court of Penna. granted certiorari on July 20, 1978. Thereafter on November 27, 1978, affirmed the order of the lower court in an 11 page opinion with 2 judges dissenting.

It is from the denial of the Order entered by the Pennsylvania Supreme Court on November 27, 1978, your petitioner seeks a review of that Opinion and Order and files this Petition For Writ Of Certiorari.

#### REASONS FOR GRANTING THE WRIT

1. Petitioner believes an important question of constitutional law is at issue here, the dimensions of the degrees of absolute or qualified immunity afforded appointed counsel in a criminal prosecution from the suit of his former client, which has not been decided by this Court.

2. Petitioner believes that the decision of the Supreme Court of Pennsylvania is in direct contradistinction with recent decisions of this Court in Imler v Pachtman, 424 U.S. 409 (1976); Butz v Economou, 42 L.W. 4961 (1973) and Wood v Strickland, 420 U.S. 308 (1975) pertaining to the application of the doctrine of absolute immunity beyond an exercise of discretion.

#### ARGUMENT

It is the petitioner's position that he should have been permitted to pursue his complaint; that the Supreme Court of Penna. has stretched beyond what is necessary the outer limits of absolute immunity afforded defense counsel in presenting and protecting his client's case before the Courts. In support thereof he presents the following:

1. Petitioner contends that the failure of assigned counsel (acting under a full fee basis) in a criminal prosecution to interpose the statute of limitation defense in behalf of his client is akin to a research duty analogous to an administrative function or investigative activity where at best only a qualified immunity is available from the suit of his former client, since that duty is not intimately associated with the judicial



of the representation and requires no exercise of judgement where immunity is necessary. Imbler, supra, Butz, supra.

Since the limitation defense could have been raised after trial but before sentencing (a 43 day period), the inexcusable negligence of the respondent to see that all defenses are proffered, a Constitutional obligation Brescia v New Jersey, 417 U.S. 921 (1975), precluded a qualified immunity and only a good faith defense is available, Wood v Strickland, 420 U.S. 308 (1975).

2. When the petitioner asserted his right to counsel under the Sixth Amendment, Hamilton v Alabama, 368 U.S. 52 (1961) he did not waive or agree to waive, Johnson v Zerbst, 304 U.S. 458 (1933) his [other] Constitutional rights to seek redress for a potential tort inflicted upon him by assigned counsel, i.e., the tolerable dilemma of having to surrender one Constitutional right to assert another, Simmons v United States, 390 U.S. 377 (1968).

3. Pursuant to the doctrine of collateral estoppel the respondent is precluded from averting liability for his professional misconduct.

a) States may regulate the issuance of licenses to professionals and code of performance (or conduct) expected from those licenses, in this case lawyers, Spevack v Klein, 385 U.S. 511 (1968), N.A.A.C.P. v Buttons, 371 U.S. 415 (1963) unless the regulation infringes upon constitutional privileges, Cohen v Hurley 366 U.S. 117 (1961). Under Penna. law, Rule 205 (A. 15) Pa. R. of Civil P., adopts the A.B.A.'s Code of Professional Responsibility as Statutory law, Slater v Rimer, Inc., 338 A. 2d 584 (Pa. Sup. 75) Ruth v Crane, 392 F. Supp. 724 (D.C. Pa. 75). Canons 6-6 and 7 of the Professional Code of Responsibility prohibits a lawyer from averting his liability for his professional malpractice.

b) The W.D. of Pa.'s Criminal Justice Act Plan also adopts the A.B.A.'s Code of Professional Responsibility (A. 15). That plan has the force and effect of statutory law, American Roller Co. v Budinger, 513 F. 2d 982

(3 Cir 75), Woods Construction Co. v Atlas Chemical Ind. Inc., 337 F. 2d 838 (5 Cir. 64) the rules adopted by the U.S.D.Cs. have force and effect of law. Their are numerous authorities that hold the fee compensation schedule in the U.S.D.C's Plans are statutory law, United States v Owens, 256 F. Supp. 861 (D.C. Pa. 66). Therefore the same principle of law expressed in item 3 (a) above applies here.

Thus one cannot avail himself to the benefits of a statute in one and later with the other hand repudiate its validity, Buck v Kuykendall, 69 L. Ed. at 627, Cohen, supra, overruled in Spevack, supra (on 5th Amend. Privilege) unless that statute infringes on Constitutional privileges.

4. The ruling of the Penna. Supreme Court violates the Petitioner's rights under the 14th Amendment's equal protection clause. Petitioner, unlike the criminal defendant proceeding with retained counsel, has no avenue of redress for a tort inflicted upon him by his assigned counsel, regardless of the nature of the tort.

5. The Penna. Supreme Court has invalidated contractual obligation between the petitioner and the respondent grounded under the Sixth Amendment's attorney-client clause, National Savings Bank v Ward, 100 U.S. 195, with the government merely guaranteeing payment for the petitioner is not relieved under the contract for its financial obligations, <sup>(A. 15)</sup> Fuller v Oregon, 417 U.S. 40 (1974), United States v Kahn, 415 U.S. 239 (1974) (see A. 15). This Court held in Perry v United States, 79 L. Ed. 912 (1935) that even Congress could not repudiate the government's obligations to pay on certain certificates. Thus the Penna. Supreme Court's ruling has also enacted a bill of attainder, after the fact, upon those parties who seek redress for constitutional torts inflicted upon them by their assigned counsel in a criminal case.

6. The need to provide assigned counsel in a criminal case absolute immunity for a tort committed beyond an exercise of discretion from the suit of his former client has disappeared in today's competitive market, Bates et al v State Bar of Arizona, 53 L. Ed. 2d 810 (1977), with over 453,000 lawyers competing for clients. With today's fee paying schedules for Court appointments many lawyers compete for court assignments and often earn the bulk of their livelihood from court appointments.

The critical inquiry here concerns the nature of the official behavior challenged not the identity or the title of the officer responsible, Briggs v Goodwin, 569 F. 2d 10 (D.C. Cir. 77) for liability in damages for unconstitutional conduct or otherwise illegal behavior has the very desirable effect of deterring such conduct, Imbler, supra at 442 Justice White concurring.

Certainly the flow of school teachers has not diminished since the Wood, supra decision, nor of prosecutors since Burkhart v Saxbe, 397 F. Supp. 499 (E.D. Pa. 75) (see Imbler, supra at 430 f.n. 31), nor of Federal Agents since, Bivens v Six Unknown Narcotic Agents, 403 U.S. 333 (1971), nor of Governors since Schuer v Rhodes, 94 S. Ct. 1639 (1974), nor of lawyers Port Meyers Seafood Packers Inc. v Stepan & Johnson, 331 F. 2d 261 (1961).

1/ Certainly the public trust is entitled to adequate protection absent liability for the appointed counsel for a constitutional tort beyond an

1/ No restraint in the form of a potential liability is suggested here while the attorney is vigorously performing his duties as the advocate before the bar, rather it is called to this Court's attention we are dealing with lawyers who are trained in the law unlike the public official who is cast into position of having to make decision he is unfamiliar with, knowing he cannot please all parties affected, and the tort that may attach.

exercise of judgment, beyond his counterpart the prosecutor, public justice becomes meritless and the condoning of the tort in question here would only add to the mistrust the public now places in the legal profession.

Here the respondent seeks to hide behind the immunity afforded his profession as a whole for his individual professional misconduct when it is doubtful if he could obtain the support of his colleagues for the tort committed here. 2/

Since relief is precluded through the criminal appeal process how then may the petitioner seek relief for the undeniable constitutional tort inflicted upon him here.

2/ In each case cited by the Pa. Supreme Court pertaining to the liability of an appointed attorney from the suit of his former client, that client was unable to prove he was unjustly convicted through the lawyers' remiss and complained of the lawyers' trial tactics.

CONCLUSION

It is respectfully submitted that a writ of certiorari ought to be granted to review and decide the constitutional question presented here, the boundaries of absolute or qualified immunity afforded assigned counsel in a criminal prosecution from the suit of his former client for the constitutional tort inflicted upon that client by his former assigned counsel.

Respectfully submitted,

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EDITOR'S NOTE: ALL DOCUMENTS ATTACHED AS  
EXHIBITS TO THE PETITION  
ARE REPRINTED IN THE SEP-  
ARATE APPENDIX VOLUME.